and it plans to invest substantially more to become a facilities-based provider in Oklahoma.[24] And Cox, with an existing cable television system in Oklahoma City, is precisely the type of provider that Congress envisioned as providing meaningful facilities-based competition. See H.R. Conf. Rep. No. 104-458, at 148 (1996).[25]

There is no reason to believe that Brooks or Cox would wish to delay becoming operational as facilities-based competitors. Neither stands to benefit from delaying SBC's entry into in-region interexchange markets because neither has significant interexchange business in Oklahoma, and Brooks' substantial investments will yield no return until it begins to serve customers. Moreover, SBC's complaints that waiting for Brooks and/or Cox to become operational would unduly delay its entry into in-region interLATA service ignore the evidence that SBC has failed to cooperate fully in that process.[26] And, in any event, if SBC can establish

---

[24] See Affidavit of Gregory J. Wheeler ("Wheeler Aff.") ¶7, attached to Brief in Support of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma, CC Docket No. 97-121 ("SBC Brief") (Apr. 11, 1997).

[25] There are also other potential competitors in Oklahoma that have installed or are constructing facilities, and have entered into agreements with SWBT; they also may provide a basis for a Track A application once they have fully implemented agreements and they have become operational. For example, SBC's application notes that the competitive access provider ACSI already has facilities in Tulsa, and that Sprint, which has an approved agreement, is constructing PCS facilities in Tulsa. SBC Brief at 93-94.

[26] In particular, to the Department's knowledge, SBC has provided no working physical collocation in Oklahoma. Brooks Fiber requested collocation in SWBT's central offices in Tulsa in June, 1996, but, as of the date of SBC's application, still had not received collocation. Initial Comments of Brooks Fiber Communications of Oklahoma Inc. and Brooks Fiber Communications of Tulsa Inc., OCC Cause No. PUD 97-64 ("Brooks OCC Comments"), at 3-4 (Mar. 11, 1997). Brooks has also complained that it cannot order unbundled loops because it has

that both Brooks and Cox have "violated the terms of an agreement approved under Section 252" by failing "to comply, within a reasonable period of time, with the implementation schedule contained in such agreement," it has a remedy under Section 271(c)(1)(B).

Because SBC has received timely requests for interconnection and access from potential facilities-based carriers triggering the requirements of Track A (and has not obtained a certification that the requesting carriers have failed to negotiate in good faith or have failed to implement their agreements within a reasonable period of time), it is not eligible to proceed under Track B.

B. SBC's Application Does Not Meet the Requirements of Track A Because No Operational Facilities-Based Provider Serves Residential Customers

SBC's claim that it has satisfied Track A rests on its provision of interconnection and access to Brooks Fiber, the only new operational local exchange provider in Oklahoma with whom SBC has an approved access and interconnection agreement. Although Brooks plans to offer service to residential subscribers in Oklahoma (and is doing so in other states), and has a tariff on file in Oklahoma under which it could at some point serve residential customers, it is not presently a "competing provider of telephone exchange services ... to residential ... subscribers," as required by Section 271(c)(1)(A). It is undisputed that Brooks' only residential services are provided by resale of SBC services to four Brooks employees who are participating in a very limited trial, in order to test whether such resale would work well enough to be offered

---

no working interconnection arrangements with SWBT. See infra Part III.C.2.

commercially.[27] The provision of service on a test basis does not make Brooks a "competing provider" of service to residential "subscribers," in the absence of any effort on Brooks' part to provide service on a commercial basis. Therefore, SBC does not satisfy the requirements of Track A.

III. SBC Has Failed to Show that It Has Satisfied the Competitive Checklist Requirements

A. SBC Must Provide Each of the Checklist Items in a Manner that Will Enable Its Competitors to Operate Effectively

Section 271(c)(2)(A) requires that a BOC proceeding under Track A provide access and interconnection that meets the requirements of the fourteen-point "competitive checklist" set

---

[27] See Brooks OCC Comments at 2. Administrative Law Judge Goldfield determined in the OCC's Section 271 proceeding, on the basis of the uncontroverted evidence, that "all four of the [Brooks] residential customers are provided through resale of SWBT service and on a test-basis." ALJ Report at 14, 35. In addition, the affidavit of John C. Shapleigh, Brooks' Executive Vice President-Regulatory and Corporate Development, submitted to the Commission with ALTS' motion to dismiss this application, plainly states that "Brooks is not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma." Mr. Shapleigh explains that Brooks' local exchange service tariffs in Oklahoma are subject to the "availability on a continuing basis of all the necessary facilities," and because "necessary facilities are not yet available, Brooks is not accepting any request in Oklahoma for residential service." Brooks' four employees testing the resold SWBT service, Mr. Shapleigh states, do not pay for the service, and the test is "in no way a general offering of residential service." Brooks, according to Mr. Shapleigh, "has made no decision yet as to the timing of an offering of residential service in Oklahoma," and has not yet gained enough experience with SWBT's resale systems "to determine whether Brooks can effectively use them on even an ancillary basis" to its planned use of SWBT's unbundled loops when those become available. Affidavit of John C. Shapleigh ("Shapleigh Aff.") ¶¶ 3-6, attached to Motion to Dismiss and Request for Sanctions by the Association for Local Telecommunications Services, CC Docket No. 97-121 ("ALTS' Motion") (Apr. 21, 1997).

forth in Section 271(c)(2)(B), pursuant to "one or more agreements."[28] The competitive checklist specifies a minimum set of facilities, services, and capabilities that must always be made available to competitors, thereby ensuring that a wide range of entry strategies will be available.[29]

Because the statute allows the BOC to provide access and interconnection pursuant to "one or more agreements," it does not matter whether any single competitor requests or uses all fourteen checklist items, so long as the BOC is providing each element to at least one facilities-based competitor. Moreover, that requirement may be satisfied, at least in some instances, through the use of "most favored nation" clauses which readily allow provisions of other approved interconnection agreements to be imported into agreements with qualifying Track A competitors. Since different competitors may need different checklist items, depending on their individual business plans, such flexibility furthers the Congressional purpose of maximizing the options available to new entrants, without foreclosing BOC long distance entry simply because its competitors choose not to use all of the options.

For the same reason, we believe that, under some circumstances, a BOC may be

---

[28]A BOC proceeding under Track B must be "generally offering" such access and interconnection.

[29] Many of the checklist items expressly require "nondiscriminatory" provision, and in addition the "nondiscriminatory" terms and conditions required by Section 251 apply both to the LECs' treatment of other competitors and to the LECs' treatment of their own affiliates, so that the LECs must provide unbundled elements at the same level of quality as they do for themselves, to the extent technically feasible. Local Competition Order at ¶¶ 217-18 (footnotes omitted).

"providing" a checklist item under an agreement even though competitors are not actually using that item, at least where no competitor is actually requesting and experiencing difficulty obtaining that item. A BOC is providing an item, for purposes of checklist compliance, if the item is available both as a legal and practical matter, whether or not any competitors have chosen to use it. If a BOC has approved agreements that set forth complete prices and other terms and conditions for a checklist item, and if it demonstrates that it is willing and able promptly to satisfy requests for such quantities of the item as may reasonably be demanded by providers, at acceptable levels of quality, it still can satisfy the checklist requirement with respect to an item for which there is no present demand.

By the same token, however, an agreement that does not set forth complete rates and terms for a checklist item, but merely invites further negotiation at some later time, falls short of "providing" the item as required by Section 271, as does a mere "paper commitment" to provide a checklist item, i.e., one unaccompanied by any showing of the actual ability to provide the item on demand.[30] Nor does an offer to provide a checklist item at some time in the future constitute "providing" it, if the item is not presently available. In sum, a BOC is "providing" a checklist item only if it has a concrete and specific legal obligation to provide it, is presently ready to

---

[30] In arguing that it is "providing" checklist items even though competitors are not actually using such items, SBC analogizes the provision of items under the checklist to a dinner party, contending that the host has "provided" hors d'oeuvres even if no one chooses to partake. SBC Brief at 16 n.17. We agree with SBC that it may "provide" checklist items in this sense, but only if the provided food is edible, available in adequate quantities, and if the guests are allowed access to it.

furnish it, and makes it available as a practical, as well as formal, matter.[31]

The 1996 Act provides an opportunity for state commissions to evaluate a BOC's compliance with the checklist but, as the 1996 Act makes plain, the final determination of compliance rests with the FCC. Section 271(d)(3) requires the Commission to deny BOC applications unless "it" finds that the statutory requirements have been satisfied. Similarly, Section 271(d)(2)(B) requires the FCC to "consult with the State commission . . . in order to verify the compliance" of an applicant with the checklist requirements, language which clearly indicates that verification is ultimately the FCC's responsibility.

B. The Oklahoma Corporation Commission's Opinion that SBC Satisfies the Checklist Reflects Its Erroneous Legal Interpretations

SBC has failed to demonstrate compliance with the competitive checklist requirements in Oklahoma.[32] We reach this conclusion, and believe the Commission should as well, despite the contrary conclusion of the majority in the Oklahoma Corporation Commission's split 2-1 decision.

---

[31] Several state commissions and state officials have followed a similar approach to dealing with SGAT approval and checklist compliance in their Section 271 compliance proceedings. See, e.g., Hearing Examiner's Proposed Order, Investigation concerning Illinois Bell Telephone Company's Compliance with Section 271(c) of the Telecommunications Act of 1996, Illinois Commerce Commission, Docket No. 96-0404 ("ICC HEPO"), at 6-8 (Mar. 6, 1997); Order Regarding Statement, BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Georgia Public Service Commission, Docket No. 7253-U ("GA PSC Order"), at 6-7 (Mar. 20, 1997).

[32] In light of the other clear deficiencies, this evaluation address only some of the substantial checklist issues raised by SBC's application.

We assume that the FCC will carefully weigh the views of state commissions, as the Department does. In this case, however, the OCC majority did not adopt detailed factual findings concerning checklist compliance issues, and their conclusions appear to rest, in large part, on what we believe to be an incorrect legal interpretation of the checklist. The OCC majority determined that all of the requisite checklist items "are either provided to or generally offered to" competitors by SBC, and also noted the absence of any filed complaint regarding provision of service, asserting that lack of entry was "not due to SWBT's failure to make available" checklist items.[33] The OCC majority, however, made no findings concerning the practical availability of checklist items.

In contrast to the OCC's limited view of what the checklist requires, the Administrative Law Judge, who presided over the OCC's Section 271 proceeding, understood Section 271 to mean that "all checklist items must be easily and equally accessible, on commercially operational terms and on equal terms as to all." He concluded that this standard had not been satisfied with respect to several checklist items, including OSS, interim number portability, collocation, and directory assistance, finding that "the evidence in this case is that SWBT does not currently provide all checklist items in such a manner." Accordingly, the ALJ determined that "[t]he evidence in this case indicates that there are currently impediments and blockades to local competition in Oklahoma."[34] The dissenting OCC Commissioner, as well as the Oklahoma

[33] Final Order, OCC Cause No. PUD 97-64, Order No. 411817 ("OCC Final Order"), at 2-3 (Apr. 30, 1997).

[34] ALJ Report at 35-36.

Attorney General and the OCC staff, agreed with the ALJ's finding that the checklist had not been satisfied.[35] The Department concurs with their conclusions on this issue.

C. SBC Has Failed to Provide Several Checklist Items

1. SBC Has Failed to Show that Competitors Can Effectively Obtain and Maintain Resale Services and Unbundled Elements

The competitive checklist of Section 271(c)(2)(B) requires a BOC proceeding under Track A to "provide" resale services and access to unbundled elements, among other items, pursuant to Section 251. A CLEC using these items will have to engage in multiple transactions with the BOC for each customer or access line the CLEC wins in competition with the BOC. Because each BOC has *millions* of access lines, meaningful compliance with the requirement that the BOC make available resale services and access to unbundled elements demands that the BOC put in place efficient processes, both electronic and human, by which a CLEC can obtain and maintain these items in competitively-significant numbers. The checklist requirements of providing resale services and access to unbundled elements would be hollow indeed if the efficiency of -- or deficiencies in -- these "wholesale support processes," rather than the dictates of the marketplace, determined the number or quality of such items available to competing carriers.[36]

---

[35] Dissenting Opinion of Commissioner Bob Anthony, OCC Cause No. PUD 97-64 ("Anthony Dissenting Op."), at 1-3 (Apr. 30, 1997).

[36] AT&T alone has provided SBC with forecasts of over one hundred thousand resale orders per month in SBC's region. Attachment 21 to the affidavit of Nancy Dalton ("Dalton Aff."), attached to Comments of AT&T in Opposition to SBC's Section 271 Application for Oklahoma, CC Docket No. 97-121 ("AT&T FCC Comments") (May 1, 1997). Automated

A key component of the wholesale support processes necessary to provide adequate resale service and unbundled elements is the electronic access to the operations support system (OSS) functions that BOCs must provide under the Commission's rules. In its Local Competition Order, the Commission required BOCs to provide access to their OSSs—systems originally designed to facilitate practicable provision of retail services—as an independent network element under Section 251(c)(3) that the BOCs must provide under item (ii) of the checklist,[37] as well as a term or condition of providing access to other network elements under the checklist. In evaluating checklist compliance with regard to a BOC's OSS systems, the Department will evaluate (1) the functions BOCs make available; and (2) the likelihood that such systems will fail under significant commercial usage. Overall, the Department will consider whether a BOC has made resale services and unbundled elements, as well as other checklist items, practicably available by providing them via wholesale support processes that (1) provide needed functionality; and (2) operate in a reliable, nondiscriminatory manner that provides entrants a meaningful opportunity to compete.[38]

---

ordering interfaces can take many months to develop, and several BOCs have encountered problems that extended such development over a year. Allegedly "providing" such resale services without the current capability to furnish competitively-significant numbers of such services falls short of satisfying a BOC's obligations under Section 271(c).

[37] Local Competition Order at ¶ 517. Because the Commission interpreted access to OSS as a term or condition of providing resale services and access to other elements in general, this requirement is also embodied in, among other items, checklist items (iv), (v), (vi), and (xiv).

[38] Section 251(c)(3), referenced in item (ii) of the checklist and implicated in many others, obligates an incumbent LEC to provide access to unbundled elements (OSS functions and other elements), upon request, that is "nondiscriminatory," and on rates, terms, and conditions that are

a. Checklist Compliance Requires Automated Support Systems

Under Section 271, an applicant must demonstrate that it can practicably provide checklist items by means of efficient wholesale support processes, including access to OSS functions. These processes must allow CLECs to perform ordering, maintenance, billing, and other functions at parity with the BOC's retail operations. Further, a BOC's wholesale support processes must offer a level of functionality sufficient to provide CLECs with a meaningful opportunity to compete using resale services and unbundled elements. Thus, in general, to satisfy the checklist wholesale support processes must be automated if the volume of transactions would, in the absence of such automation, cause considerable inefficiencies and significantly impede competitive entry. Appendix A describes in more detail the types of automated systems that, in the Department's experience, are likely to be necessary to provide adequate wholesale support processes.

"just, reasonable, and nondiscriminatory." Finding that "just [and] reasonable . . . terms and conditions" are those that "should serve to promote fair and efficient competition," the Commission properly has required BOCs to provide unbundled elements and resale services under "terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." Local Competition Order at ¶ 315; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Order on Reconsideration, CC Docket Nos. 96-98 and 95-185 ("2nd Recon Order"), at ¶ 9 (specifically discussing access to operations support systems). Separately, the Commission interpreted Congress' use of the term "nondiscriminatory" in Section 251, and in particular with regard to "nondiscriminatory access" to unbundled elements, as requiring a comparison between a BOC's access to elements and the access provided CLECs (in addition to a comparison between the access afforded different CLECs). This interpretation establishes a parity requirement where a meaningful comparison can be made between a BOC's and a CLEC's access to the BOC's network elements. The Commission required such a comparison "where applicable." 2nd Recon Order at ¶ 9; Local Competition Order at ¶ 315.

b. A BOC Must Demonstrate that Its Wholesale Support Processes Work Effectively

A BOC's paper promise to provide the necessary (e.g., automated) wholesale support processes is a first step. A BOC must also, however, demonstrate that the process works in practice. Specifically, a BOC must demonstrate that its electronic interfaces and processes, when combined with any necessary manual processing, allow competitors to serve customers throughout a state and in reasonably foreseeable quantities, or that its wholesale support processes are scalable to such quantities as demand increases. By "reasonably foreseeable," we mean those quantities that competitors collectively would ultimately demand in a competitive market where the level of competition was not constrained by any limitations of the BOC's interfaces or processes, or by other factors the BOC may influence.[39]

In determining whether a BOC's wholesale support processes can provide the necessary functionality, the Department will view internal testing by a BOC as substantially less persuasive evidence of operability than testing with other carriers, and testing in either manner as less

---

[39] See, e.g., Comments of the Wisconsin Department of Justice Telecommunications Advocate in Response to Second Notice and Request for Comments, Wisconsin Public Service Commission, Docket No. 6720-TI-120, at 7 (Jan. 27, 1997):

> In order for the systems to be considered operational, they must satisfy at least two tests. First, Ameritech must demonstrate that the systems incorporate sufficient capacity to be able to handle the volumes of service anticipated when local competition has reached a reasonably mature state. . . . In addition, the systems must have been proven adequate in fact to handle the burdens placed upon them as local competition first takes root.

persuasive evidence than commercial operation. In general, the Department will consider testing evidence alone only if the more compelling evidence that can be derived from commercial operation is not available. Where such commercial operation is limited (*e.g.*, below reasonably foreseeable levels, limited to certain geographic regions, or limited to certain functions) or not expected, the Department will carefully examine the circumstances to determine whether factors under the BOC's control are responsible for the absence of significant commercial use. This approach is based on the findings and comments of states, industry organizations, experts, CLECs, and BOCs, alike, all of which reflect specific experiences in the local telecommunications industry to date, in addition to general experience in this and other industries.

c. SBC's Provision of Resale Services and Access to Unbundled Elements Fails The Statutory Checklist Standard

As Appendix A describes in detail, SBC has not demonstrated that its wholesale support processes are sufficient to make resale services and unbundled elements practicably available when requested by a competitor, as required by the checklist. Indeed, there is evidence in the record to suggest that SBC has thwarted CLEC attempts to test and commercially use the wholesale support processes SBC claims to provide, as discussed in Part IV. Most critically, however, the Department finds that SBC has failed to demonstrate even through internal testing the operation of its automated processes for making resale services and unbundled elements meaningfully available.

2. Interconnection: SBC Has Failed to Provide Requested Physical Collocation

"Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" is part of the statutory competitive checklist in Section 271(c)(2)(B)(i). Section 251(c)(6) of the 1996 Act imposes a specific duty to provide physical collocation unless the incumbent LEC demonstrates to the state commission that this is not practical due to technical limitations or lack of space on the LEC's premises. Applying this requirement, the Commission has ruled that a requesting carrier may choose any technically feasible means of obtaining interconnection, including physical collocation.[40] 47 C.F.R. §§ 51.321(b)(1), 51.323 (1997). Accordingly, the failure to provide physical collocation upon request constitutes a failure to provide interconnection as required by the checklist, unless the BOC has demonstrated that one of the exemptions applies. The availability of physical collocation is critical to a competing local providers' ability to interconnect and to serve local exchange customers through the use of unbundled elements.

Although SBC has provisions in its SGAT and some of its agreements relating to collocation, and claims to generally offer physical collocation as an interconnection alternative, it has failed to provide adequately the physical collocation requested by Brooks, among others.[41] In

[40] Local Competition Order at ¶¶ 549-551.

[41] The Department is aware of no working physical collocation arrangement in any SWBT central office in Oklahoma, and very few in other SBC states. In SBC's Opposition to the ALTS' Motion to Dismiss in this docket, SBC asserts, in the affidavit of Deanna Sheffield, that it had completed and turned over four collocation cages to Brooks, as of April 25, 1997. SBC acknowledges, however, that these arrangements are not working, because Brooks has not yet

June, 1996, Brooks Fiber requested collocation in SWBT's central offices in Tulsa and Oklahoma, but, as of the date of SBC's application, Brooks still had not received collocation. Brooks OCC Comments at 3-4. SWBT's failure to provide physical collocation, which would enable CLECs to use unbundled elements and to test the OSS interfaces which support these elements, appears to be a region-wide problem.

SBC's Opposition to ALTS' Motion to Dismiss asserts, through the affidavit of William Deere, that Brooks' current virtual collocation arrangements provide access to all functions requested in the interconnection agreement, including the ability to use unbundled loops. Affidavit of William Deere ("Deere Aff."), ¶ 2, attached to SBC Opposition to ALTS' Motion. SBC, however, does not effectively respond to Brooks' position in its OCC Comments that its current virtual collocation arrangements do not give Brooks the same technically and economically feasible access to unbundled elements that its negotiated physical collocation

---

had an opportunity to place and test equipment. Affidavit of Deanna Sheffield ("Sheffield Aff."), ¶¶ 2-3, attached to SBC Opposition to ALTS' Motion. Similarly, in the Public Utility Commission of Texas' investigation into SWBT's entry into the interLATA market, SWBT's response to a Request for Information on April 24, 1997, indicated that it had delivered only four working physical collocations out of 59 requests in Texas. Two of the offices were delivered to Metro Access Networks, which is currently in arbitration with SWBT on the physical collocation pricing issue, and, thus, does not have an interconnection agreement with SWBT. Response of SWBT to Request for Information, Investigation of Southwestern Bell Telephone Company's Entry Into the Texas InterLATA Telecommunications Market, Public Utility Commission of Texas, Docket No. 16251 ("Texas RFI Response"), Request No. 18-JE (Attachment E to this Evaluation. Some parts of the Texas RFI Response were submitted under claim of confidentiality by SWBT. The Department has not had access to the confidential portions of SWBT's responses and the responses offered in this attachment were not submitted under claim of confidentiality).

arrangements would provide. Brooks explains that, "[w]ith tariffed virtual collocation, the point of interconnection normally is outside of the central office, deployment of remote switching equipment is not permitted, and the interconnector designates but does not own the transmission equipment . . . This type of virtual collocation is not usable by Brooks for unbundled loop access due to both network and economic feasibility considerations." Brooks OCC Comments at 3 n.6. In its comments in this docket, Brooks continues to assert that its current tariffed virtual collocation arrangements do not technically or economically support the use of unbundled loops and, as a result, they have had to use less effective alternatives than the use of unbundled loops. Opposition of Brooks Fiber Properties, Inc., to Application of SBC Communications Inc., CC Docket No. 97-121 ("Brooks FCC Comments"), at 10 n. 6 (May 1, 1997).

In any event, regardless of the adequacy of virtual collocation, CLECs are entitled to physical collocation under the 1996 Act, and SBC must provide it when requested. The fact that potential facilities based competitors other than Brooks have requested physical collocation in Oklahoma and have yet to receive it from SWBT strongly suggests that the problems experienced are attributable to SBC rather than to any particular competitor. Cox Communications made its initial request for physical collocation in October of 1996 and it does not expect even to be able to begin placing equipment until July of 1997.[42] Dobson Wireless ("Dobson"), in its Comments in Support of Motion to Dismiss, filed in this docket on April 28, also cites the difficulty of obtaining physical collocation from SWBT as an impediment to timely entry in Oklahoma.

---

[42] See Affidavit of Jeff Storey ("Storey Aff."), ¶6, attached to Cox FCC Comments.

Dobson, despite having initially requested interconnection negotiations on December 13, 1996, is still in "negotiations" with SWBT over terms for physical collocation in SWBT's tandem central office in Oklahoma City. See Comments of Dobson Wireless, Inc., In Support of Motion to Dismiss, CC Docket No. 97-121 ("Dobson ALTS' Motion Comments") at 1-3 (Apr. 28, 1997). Thus, on the present record, it cannot be said that SWBT is either providing physical collocation or making it generally available in Oklahoma.[43]

3. Interim Number Portability: Experience Has Shown that SBC Is Not Yet Able to Provide this Checklist Item Adequately and at Parity with Its Own Retail Services

SBC has failed to provide adequate interim number portability as required by the competitive checklist. Section 271(c)(2)(B)(xi) requires that the BOC's access and interconnection agreements or statement of terms include "[u]ntil the date by which the Commission issues regulations pursuant to section 251 to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing

[43]SBC's efforts to comply with this checklist item have not been expeditious. In Oklahoma, there is no statewide tariff for physical collocation and no prices for physical collocation are listed in the SGAT. In Texas, SWBT was ordered to file a physical collocation tariff as part of implementing an arbitration award involving AT&T, MCI, TCG, MFS, and ACSI. The tariff that was filed listed many central offices as not suitable for tariffing, meaning that they would have to be negotiated on an individual case basis, and the "tariff" was only available to those three parties who specifically requested physical collocation in the arbitration proceeding. See Letter from Metropolitan Access Networks (MAN) to Donald Russell of 3/5/97 at 9 (Attachment F to this Evaluation). The problem with making physical collocation "available" on an individual case basis, as SWBT does in its Oklahoma SGAT and the Brooks agreement, is that all SBC is really providing is an invitation to do more negotiating on price and terms. This can cause further delay and may lead to more arbitration. Id. at 3-4.

trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability and convenience as possible. After that date, full compliance with such regulations." Lack of number portability or inferior quality of number portability when switching from the BOC to a competitor would constitute a major disincentive for customers to change their local exchange provider. Thus, SBC's failure to provide adequate, non-discriminatory number portability constitutes a significant barrier to the development of local competition in Oklahoma.

SBC has provisions in its SGAT and a number of its agreements with competitors purporting to provide interim number portability. This is, in fact, one of the few provisions of SBC's agreements that any competitor has had the opportunity to use in market conditions in Oklahoma, and the experience is not encouraging. Brooks, the only operational local competitor in Oklahoma, has sought to port some numbers from SWBT, but Brooks' experience in Oklahoma refutes SBC's assertion that it is providing interim number portability on a nondiscriminatory basis in accordance with the requirements of the 1996 Act.

At the time of SBC's application with the Commission, Brooks' customers had experienced delays of up to several hours between the disconnection (for billing purposes) and the reconnection of the customer's line with remote call forwarding. See Brooks Response to AT&T Request for Information, OCC Cause No. PUD 97-64, at 2 (Apr. 9, 1997). Moreover, SBC has not clearly demonstrated the ability to provision interim number portability ("INP") in a "non-discriminatory" manner such that a competitor using INP would be able to provide the same level of service to its customers that SWBT provides its own retail customers. Failures of this

sort can be very disruptive to users, especially business customers, and may discourage them from switching providers. SWBT has asserted, and Brooks acknowledges, that some recent INP conversions have been implemented without any major service disruptions, but there continue to be implementation problems for many Brooks customers. See Brooks FCC Comments at 23-24. Even if SBC were able to improve its provisioning of INP to satisfactory levels given Brooks' current level of demand, the information before the Commission would not yet justify the conclusion that SWBT has the processes or resources in place to handle a commercial quantity of INP orders in an efficient manner, once Brooks or others actually have access to unbundled elements and their demand for INP becomes significantly greater.

IV. SBC Has Failed to Meet the Public Interest Standard as its Local Markets in Oklahoma are Not Open to Competition

The public interest in opening local telecommunications markets to competition also requires that the Commission deny SBC's interLATA entry application. SBC does not presently face any substantial local competition in Oklahoma, despite the potential for such competition and the expressed desire of numerous providers, including some with their own facilities, to enter the local markets. The evidence discussed in Part III (and in Appendix A) indicates that SBC's failure to provide adequate facilities, services and capabilities for local competition is in large part responsible for the absence of substantial competitive entry. If SBC were to be permitted interLATA entry at this time, its incentives to cooperate in removing the remaining obstacles to entry would be sharply diminished, thereby undermining the objectives of the 1996 Act. Finally,

without observing commercial use or testing of SBC's wholesale support processes to ensure their adequacy and ability to meet specified performance measures, the Department cannot conclude that regulation can safeguard against any future abuse or neglect by SBC, i.e., to prevent it from taking advantage of its dominant position in the market. Accordingly, as the local market in Oklahoma has not been irreversibly opened to competition, it would not be in the public interest to grant SBC's application for interLATA authority.

A. The Public Interest Requirement and the Department of Justice's Competitive Assessment

Congress supplemented the threshold requirements of Section 271, discussed in Parts II and III above, with a further requirement of pragmatic, real world assessments of the competitive circumstances by the Department of Justice and the Commission. Section 271 contemplates a substantial competitive analysis by the Department, "using any standard the Attorney General considers appropriate," 47 U.S.C. § 271(d)(2)(A)(1997). The Commission, in turn, must find before approving an application that "the requested authorization is consistent with the public interest, convenience, and necessity," 47 U.S.C. § 271(d)(3)(C)(1997), and, in so doing, must "give substantial weight to the Attorney General's evaluation." 47 U.S.C. § 271(d)(2)(A)(1997). The Commission's "public interest" inquiry and the Department's evaluation thus serve to complement the other statutory minimum requirements, but are not limited by them.[44] As we

[44] Congress' desire not to limit the Department's and the Commission's review to a mechanical approval process is consistent with the proviso in Section 271(d)(4) of the 1996 Act, which states that "The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." This provision by its express terms

explain below, the requirement of a DOJ evaluation under "any standard" and a "public interest" finding by the Commission both reflect a Congressional judgment that Section 271 applications should be granted only if the BOC's entry at the time it is sought is consistent with Congress' goal of opening local telecommunications markets to competition.

In vesting the Department and the Commission with additional discretionary authority, Congress addressed the significant concern that the statutory entry tracks and competitive checklist could prove inadequate to open fully the local telephone markets. Although some had suggested that Congress adopt additional fixed criteria -- which could have needlessly blocked procompetitive BOC entry -- to accomplish this objective, Congress instead chose to rely on the Commission's and the Department's expertise and discretion. To underscore this decision, Congress made satisfaction of the "public interest" criterion a minimum statutory precondition for relief under Section 271.[45] Consequently, it is the Department's responsibility to provide a

---

limits the Commission's actions only with regard to the competitive checklist. It does not limit the Commission's authority or responsibility to carry out its other responsibility under Section 271, i.e., to consider whether Section 272 requirements have been satisfied and to conduct its public interest inquiry, giving substantial weight to the evaluation of the Attorney General. Section 271(d)(4), in other words, prohibits the Commission from promulgating additional inflexible and mandatory access and interconnection requirements as prerequisites for approval of applications under Section 271, or from ignoring noncompliance with any of the requirements of the checklist. The Commission is not restricted, however, in determining whether particular access and interconnection arrangements are consistent with the requirements of Section 272, or in weighing public interest factors or the Attorney General's recommendations. Section 271(d)(4) encourages the exercise of such discretionary judgments by limiting the Commission's authority to impose or reduce the non-discretionary requirements of Section 271.

[45] It is a basic rule of statutory construction that every provision is to be given meaning. See e.g., Dep't of Revenue of Oregon v. ACF Industries, 510 U.S. 332, 340-341 (1994). Thus, while the Commission may have greater discretion to interpret the public interest requirement

practical evaluation of the degree to which the local telephone markets in a particular state have been opened to competition,[46] and it is the Commission's responsibility to give that evaluation substantial weight in applying the statutory public interest standard.

As the Supreme Court has made clear, the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare, but "the words take meaning from the purposes of the regulatory legislation." NAACP v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976). The term "public interest" in Section 271(d)(3) of the 1996 Act must derive its "content and meaning" from "the purposes" for which it was "adopted." Id. The "public interest" standard under the Communications Act is well understood as giving the Commission the authority to consider a broad range of factors,[47] and the courts have repeatedly recognized that competition is an important aspect of that standard under federal telecommunications law.[48] The 1996 Act reinforces the central importance of competitive

---

than the other statutory minimums, it may not fail to apply it.

[46] The legislative history of the Telecommunications Act clearly indicates that Congress contemplated that the Department would be undertaking a substantial competition-oriented analysis of Section 271 applications, not limited to compliance with checklist requirements, for which the Commission is separately required to consult with the state regulatory authorities. The illustrative examples of possible standards mentioned by Congress all were drawn from the antitrust laws and antitrust consent decrees, under which such a competition analysis would be performed by the Department drawing upon its special expertise. H.R. Conf. Rep. No. 104-458, at 149 (1996).

[47] See, e.g., FCC v. WNCN Listeners Guild, 450 U.S. 582 (1982).

[48] FCC v. RCA Communications, Inc., 346 U.S. 86, 94 (1953) ("there can be no doubt that competition is a relevant factor in weighing the public interest"); United States v. FCC, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc) ("competitive considerations are an important element

analysis, for its core purpose, as explicitly stated in the House Conference Report, is "opening all telecommunications markets to competition."[49] Highlighting its focus on promoting competition in telecommunications, Congress as well as the President envisioned a substantial role for the Department's expert evaluations, based on the competitive consequences of granting or denying a BOC's application.[50]

---

of the public interest standard"). Where a term has been authoritatively construed in a parallel statute before enactment of legislation, as with the previously existing "public interest" standard in the Communications Act, it is ordinarily presumed that Congress knew of the prior construction and intended for the term to have the same meaning in the new legislation. See Cannon v. University of Chicago, 441 U.S. 677, 696-98 (1979). In fact, Congress explicitly intended to preserve the preexisting public interest standard, as explained in the Committee report on the Senate bill, from which the public interest standard in Section 271 of the 1996 Act was taken. S. Rep. 104-23, at 43-44 (1995).

The Commission has specifically considered the openness of related vertical foreign telecommunications markets in determining whether it would be in the public interest to permit entry by the vertically integrated provider into U.S. long distance telecommunications markets. Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended, Declaratory Ruling and Order, 11 FCC Rcd 1850 (1996) (FCC found "critical component" of granting approval under the public interest standard was commitment of French and German governments to open their telecommunications markets to full competition, and that additional conditions would be necessary to prevent anticompetitive conduct and protect against risk that liberalization would not occur on schedule); MCI Communications Corporation British Telecommunications plc Joint Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) of the Communications Act of 1934, as amended, Declaratory Ruling and Order, 9 FCC Rcd 3960 (1994) (considering liberalization of United Kingdom telecommunications market and balance of anticompetitive risks and competitive benefits from transaction, without the specific comparable market openness criteria later adopted in the Sprint decision).

[49] H.R. Conf. Rep. No. 104-458, at 1 (1996). This purpose to "promote competition" is also acknowledged in the caption of the statute itself. 110 Stat. 56.

[50] See, e.g., 142 Cong. Rec. H.1152 (daily ed. Feb. 1, 1996) (statement of Congressman Hastert) ("the FCC must give substantial weight to comments from the Department of Justice about possible competitive concerns when BOCs provide long-distance service"); 142 Cong.

In performing its competitive analysis, the Department seeks to determine whether the BOC has demonstrated that the local market has been irreversibly opened to competition. To satisfy this standard, a BOC must establish that the local markets in the relevant state are fully and irreversibly open to the various types of competition contemplated by the 1996 Act -- the construction of new networks, the use of unbundled elements of the BOC's network, and resale of the BOC's services. If this standard is satisfied, local entry will be constrained only by technological limits and the inherent capabilities and resources of the potential competitors, and not by artificial barriers. In applying this standard, the Department will look first to the extent to

---

Rec. H.1165 (daily ed. Feb. 1, 1996) (statement of Rep. Berman) ("requirement designed to ensure that the FCC gives proper regard to the Justice Department's special expertise in competition matters and in making judgments regarding the likely marketplace effects of RBOC entry into the competitive long distance markets . . . acknowledging the importance of the antitrust concerns raised by such entry and to check any possible abuses of RBOC market power, the bill specifically provides that the FCC accord substantial weight to the DOJ's views on these issues "); 141 Cong. Rec. S.7970 (daily ed. June 8, 1995) (statement of Sen. Kerrey) ("I have one final test [the public interest test] that, by the way, has been litigated many, many times over the course of time. The Supreme Court has spoken many times on this issue.... This is an effort to make certain that in fact we do get competition at the local level.); 141 Cong. Rec. S.8224 (daily ed. of June 13, 1995) (statement of Sen. Thurmond) ("FCC consideration of the public interest includes antitrust analysis, as indicated by the courts and reiterated by FCC Chairman Hundt in testimony last month before the Congress"). The President also recognized in his statement issued upon signing the Telecommunications Act that "the FCC must evaluate any application for entry into the long distance business in light of the public interest test, which gives the FCC discretion to consider a broad range of issues, such as the adequacy of interconnection agreements to permit vigorous competition . . . the FCC must accord "substantial weight" to the views of the Attorney General. This special legal standard, which I consider essential, ensures that the FCC and the courts will accord full weight to the special competition expertise of the Justice Department's Antitrust Division -- especially its expertise in making predictive judgments about the effect that entry by a Bell company into long distance may have on competition in local and long distance markets." Statement at 2 (Feb. 8, 1996).

which competitors are entering the market. The presence of commercial competition, at a nontrivial level, both (1) suggests that the market is open; and (2) provides an opportunity to benchmark the BOC's performance so that regulation will be more effective. See Schwartz Aff. ¶¶ 20, 170-178. If such commercial entry has not occurred, the Department will then consider whether the lack of entry reflects the continued existence of significant barriers to competition, or results from the independent business decisions of competitors not to enter the market.

B. Issues that Should be Considered in Determining whether Markets Are Open

1. Each of the Three Entry Paths Created by Congress Must be Available to Competitors

As the Commission has recognized, the 1996 Act is designed to facilitate entry into local exchange and exchange access markets -- along the entry paths of facilities-based services, the use of unbundled elements, and resale services -- by mandating that the most significant economic, as well as legal, impediments to efficient entry into the monopolized local market be removed.[51] Since the three entry paths serve distinct and complementary purposes, local markets

[51] "The incumbent LECs have economies of density, connectivity, and scale . . . The local competition provisions of the Act require that these economies be shared with entrants . . . in a way that permits the incumbent LECs to maintain operating efficiency to further fair competition, and to enable the entrants to share the economic benefits of that efficiency in the form of cost-based prices. . . . The Act contemplates three paths of entry into the local market -- the construction of new networks, the use of unbundled elements of the incumbent's network, and resale. The 1996 Act requires us to implement rules that eliminate statutory and regulatory barriers and remove economic impediments to each . . .Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. Moreover, given the likelihood that entrants will combine or alter entry strategies over time, an attempt to indicate such a preference . . . may have unintended and undesirable results. Rather, our obligation . . . is

should not be considered to be practicably open to competition unless each of these paths is fully available to local entrants.

2. The Existence or Lack of Actual Competition

a. Significant Competitive Entry Suggests that the Market Is Open

In evaluating whether the necessary market-opening steps have been accomplished, the Department will look, first and foremost, to the nature and extent of actual local competition. If actual, broad-based entry through each of the entry paths contemplated by Congress is occurring in a state, this will provide invaluable evidence supporting a strong presumption that the BOC's markets have been opened. See Schwartz Aff. ¶¶ 24, 170-182. The lack of competitive entry into local markets, however, suggests that local markets are not yet fully open, and it will be necessary to ask why entry is not occurring. If practical opportunities are available for resale, the use of unbundled elements, and full facilities-based competition, the decisions of competitors not to adopt particular strategies in a state for certain areas or groups of customers should not preclude long distance entry by a BOC in that state, provided that all of the minimum requirements of Section 271 have been satisfied.[52] But if the BOC's failure to provide what is needed, or other artificial and significant barriers to entry, are wholly or partly responsible for the

---

to establish rules that will ensure that all pro-competitive entry strategies may be explored." Local Competition Order at ¶¶ 11, 12.

[52] Entry under Section 271(c)(1)(A), for example, requires the presence of one or more competitors serving both business and residential customers which "exclusively . . . or predominantly" use "their own" facilities.